IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-297

BERNARD KERSHMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

for the Eighth Circuit

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BERNARD KERSHMAN, your petitioner, respectfully prays that a Writ of Certiorari

be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on May 18, 1977.

OPINION BELOW

The cause was argued before a division of the United States Court of Appeals for the Eighth Circuit. The division rendered its judgment affirming the judgment of the district court, May 18, 1977.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 10, 1977, and filed in the District Court on June 28, 1977. The jurisdiction of this is invoked under 28 USC §1254(1).

STATEMENT OF QUESTIONS PRESENTED

I.

The Court Erred In That Portion Of The Instructions Hereinafter Set Forth For The

Reasons That Said Instructions Changed The Standard Of Guilt From That Of A Reasonable Doubt To That Of A Reasonable, Prudent Man's Standard and Vitiates The Burden Of Proof Instruction And The Reasonable Doubt Instruction And Assumes Facts Not In Evidence.

II.

A.

The Court Erred In Admitting Into Evidence Government's Exhibits 1 Through 177 For The Reason That Said Evidence Was Seized Pursuant To A Search Warrant That Was Issued Fixed Upon A Defective Affidavit For The Reason That Said Affidavit Lacked Probable Cause.

B.

The Court Erred In Overruling Defendant's Motion To Quash Said Search Warrant For The Reason That Said Warrant Was Issued Upon An Affidavit That Lacked Probable Cause.

III.

The Court Erred In Allowing Witness, Detective Becker, To Testify To An Out Of Court Declaration Made by Co-Defendant Smith For The Reason That Said Statement Was Made After The Conspiracy Had Come To An End And Not Made In Furtherance Of Said Conspiracy.

IV.

The Court Erred In Overruling Defendant's Motion For Mistrial After Rebuttal Witness Candice Wilson Testified That "She Didn't Want To Get Involved In Something Like This" And That She Did Not Like The Way He (Defendant) Was Conducting His Pharmacy For The Reason That Said Statements Were Highly Prejudicial And Inferred That Defendant Was Committing Other Illegal Acts And Said Statement Constituted Improper Rebuttal Testimony.

STATEMENT OF THE CASE

On September 16, 1976, an indictment was filed

against defendant and three other persons. The case was assigned to the Honorable John K. Regan, United States District Judge. A severance was granted to defendant, Bernard Kershman, and the case proceeded to trial with the three counts, Count I, Count 12 and Count 16, against Bernard Kershman. On October 29, 1976, a jury returned a verdict of guilty on each count. On November 5, 1976, defendant filed a timely Motion for New Trial and same was overruled on December 9, 1976. On December 9, 1976, defendant filed his Notice of Appeal to the United States Court of Appeals for the Eighth Circuit in the United States District Court for the Eastern District of Missouri. The defendant has appealed from a conviction of Title 18, Section 846 and Title 18, Section 841(a)(1) and from the judgment and sentence entered in accordance with Title 18, Section 4205(c) as described in 18 U.S.C., Section 4205(d).

The appellant was charged with a violation of 841 (a)(1) Title 21, United States Code and Section 846, Title 21, United States Code.

REASONS FOR GRANTING THE WRIT

I.

The Court Erred In That Portion Of the Instructions Hereinafter Set Forth For The Reasons That Said Instructions Changed The Standard Of Guilt From That Of A Reasonable Doubt To That Of Reasonable, Prudent Man's Standard And Vitiates The Burden Of Proof Instruction And The Reasonable Doubt Instruction And Assumes Facts Not In Evidence.

The Court instructed the Jury that the jury could find the defendant acted knowingly if defendant "closed his eyes" to certain facts and engaged in "studied avoidance" of the facts. The instruction was as follows:

> "In this connection, you are further instructed that if you find that the prescriptions for dilaudid which defendant filled and which are involved in Counts 12 and 16 were not issued for a legitimate medic purpose by a physician during the usual course of his professional practice and that under the facts and circumstances known to him defendant had every reason to believe that such purported prescriptions had not been issued for a legitimate medical purpose, and that defendant deliberately and consciously closed his eyes to what he had every reason to believe was the fact,

such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in this case, that defendant knew that such purported prescriptions had not been issued for a legitimate medical purpose, and hence were knowingly filled by him.

It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence warrant such inference.

You are further instructed that a licensed pharmacist who fills a prescription for a controlled substance is excepted from criminal responsibility from dispensing the controlled substance if he believes in good faith that such prescription was issued and prescribed for a legitimate medical purpose by a physician acting in the usual course of his professional practice. However, an order which purports to be a prescription for a controlled substance but which was not issued in the usual course of professional treatment is not a prescription within the meaning of the law, so that a pharmacist who knowingly fills such a purported prescription is not excused from the consequences of having distributed the controlled substance merely by reason of his being a licensed pharmacist. Whether the pharmacist has knowingly filled such a purported prescription may be proved by circumstantial evidence."

Defendant objected to the instruction as follows:

MR. SCHWARTZ: No, Your Honor. Defendant will object to the instruction beginning in this connection, you are further instructed that if you find that the prescriptions for Dilaudid which defendant filled and which are involved in Counts XII and XVI were not issued for a legitimate medical purpose by a physician during the usual course of his professional practice and that under the facts and circumstances known to him defendant had every reason to believe that such purported prescriptions had not been issued for a legitimate medical purpose, and that defendant deliberately and consciously closed his eyes to what he had every reason to believe was the fact, such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding defendant knew that such purported prescriptions had not been issued for a legitimate medical purpose, and that defendant had deliberately and consciously closed his eyes to what he had every reason to believe was the fact, such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in the light of this case, that defendant knew that such purported prescriptions had not been knowingl filled by him. It is the exclusive province of the Jury to determine whether the facts and circumstances as shown by the evidence warrants such inference. The defendant will object to that on one ground, Your Honor, that it changes the standard to which a person is judged to one of proof beyond a reasonable doubt to a reasonable prudent man's standard. I think it vitiates the burden of proof instruction and reasonable doubt instruction.

THE COURT: Well, I have already stated my reason for giving it.

What about your position instruction?

MR. SCHWARTZ: Judge, my other objection to the instruction that I just objected to was that it is - - it assumes facts that

have not been in evidence as to whether there is not proof that the prescriptions were not issued for legitimate medical purposes.

THE COURT: Those are circumstances under which the other evidence goes. These things are to be read as a whole.

MR. SCHWARTZ: It makes a comment that such studied avoidance of positive knowledge and I think that assumes a fact not in evidence and as it states that it is a fact by stating that such studied avoidance and I don't think there's any evidence of any studied avoidance.

THE COURT: It will be overruled.

We will put the good faith in here.

In United States v. Olivares-Vega, 495 F 2d 827 (2d Cir. 1974) the Court held that the element of knowledge in a criminal offense can be supplied not only by evidence of actual awareness, but by a "deliberate choice not to learn for the very purpose to assert his ignorance." 495 F 2d at 830 n. 10. Accordingly, the following portion of a charge was held not to be error in that case:

> In other words, you may find the defendant acted knowingly if you find that either he actually knew he had cocaine or that he deliberately closed his eyes to what he had every reason to believe was the fact.

ID. at 830 n. 11, citing United States v. Joly, 493 F. 2d 672, 674-76 (2d Cir. 1974). The instruction in the case at bar lacks a finding that the defendant "deliberately closed his eyes". The instruction in the case at bar comments that there is in fact "such studied avoidance".

> "Deliberate ignorance" instructions have been approved in prosecutions under criminal statutes prohibiting "knowing" conduct by the Courts of Appeals of the Second, Sixth, Seventh, and Tenth Circuits. In many other cases, Courts of Appeals reviewing the sufficiency of evidence have approved the premise that "knowingly" in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it. These lines of authority appear unbroken. Neither the dissent nor the briefs of either party has cited a case holding that such an instruction is error or that such evidence is not sufficient to establish "knowledge".

United States v. Jewell, 532 F 2d 697, 702-03 (2d Cir. 1976), and cases cited at n. 12-14. See also United States v. Dozier, 522 F 2d 226, 227 (2nd Cir. 1975), applying the principle to §841(a).

Nevertheless, the instruction was insufficient in not delineating that "knowledge" must be proven, as all other elements of an offense, beyond a reasonable doubt. See, 3.g., United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968), and authorities cited therein. Nowhere in the instruction regarding "knowledge" is it stated that same must be proven beyond a reasonable doubt. Unlike the instruction in Joly, supra, the court did not define "deliberate ignorance" as a way of sustaining the knowledge element of the crime. Rather, "deliberate ignorance" is set out as the essence of the offense. (Indeed, nowhere in the instruction is actual awareness explicitly stated to be an element of the offense.) Because it was not clearly conveyed by the court that actual knowledge was required to be proved, the jury might have believed that defendant could be convicted not only upon the basis of "deliberately closing his eyes to the facts", but upon negligence in not discerning that the prescriptions were issued for illegitimate medical purposes. In this context the phrases used by the court, to-wit:

"under the facts and circumstances known to him defendant had every reason to believe" and "studied avoidance of positive knowledge," could lead a jury into the belief that the standard was one of negligence.

This problem is particularly acute due to the lack of an instruction telling the jury that negligence, in itself, will not suffice for a conviction:

> The issue of knowledge was the only issue in dispute at appellant's trial. In all cases involving the receipt or possession of stolen goods, the definition of the requisite "knowledge" that the goods were stolen, required for a conviction makes the difference between guilt and innocence. The test is not a technical one requiring a grudging adherence to some abstract standard. The standard should always embrace the ultimate concept of mens rea. A negligent or a foolish person is not a criminal when criminal intent is an ingredient. On the other hand, the lack of direct proof that the defendant knew that the goods were stolen is, in the nature of the case, not fatal to conviction. Circumstantial evidence may suffice, but the jury must understand that to convict it must find beyond a reasonable doubt that the defendant willfully and knowingly possessed the goods, knowing them to have been stolen. Without that abiding belief on the part of the jury, there should be no conviction.

United States v. Bright, 517 F 2d 584, 586-87 (2d Cir. 1975) (emphasis added). See also

United States v. Natelli, 527 F 2d 311, 322-23 (2d Cir. 1975). Accordingly, most district courts in their instructions have been careful to clearly state to the jury that "knowledge" is not to be gauged by a "reasonable man" standard:

> While I have stated that negligence or mistake do not constitute guilty knowledge or intent, nevertheless, ladies and gentlemen, you are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his accounting work or whether he recklessly stated as facts matters of which he knew he was ignorant.
>
> If you find such reckless deliberate indifference to or disregard for truth or falsity on the part of a given defendant, the law entitles you to infer therefrom that that defendant wilfully and knowingly filed or caused to be filed false financial information of a material nature with the S.E.C.
>
> But such an inference, of course, must depend upon the weight and credibility extended to the evidence of reckless and indifferent, conduct, if any.
>
> I repeat: Ordinary or simple negligence or mistake alone would be insufficient to support a finding of guilty knowledge or willfulness or intent.

United States v. Natelli, supra, 527 F 2d at 322 n. 9.

The third element of the offense is that the defendant knew that the Treasury Bills had been stolen. Knowledge is not something that you can see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence. The government relies largely on circumstantial evidence in this case to establish knowledge.

In deciding whether a particular defendant under consideration by you knew the bills were stolen, you should consider all the circumstances, such as how the defendant handled the transaction, how he conducted himself. Do his actions betray guilty knowledge that he was dealing with stolen securities or are his actions those of a duped, innocent man?

Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant. However, it is not necessary that the government prove to a certainty that a defendant knew the bills were stolen. Such knowledge is established if the defendant was aware of a high probability that the bills were stolen, unless the defendant actually believed that the bills were not stolen.

Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him.

Thus, if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen.

United States v. Jacobs, 475 F 2d 270, 287 (2d Cir. 1973), cert. denied sub nom, Lavelle v. United States, 414 U.S. 821 (1973). What both of these instructions do is clearly state that "deliberate ignorance" is a way of proving "knowledge" and that such element cannot be shown by mere negligence. The present instruction leaves the jury to come to its own conclusion on both of these "questions".

In United States v. Bright, 517 F 2d 584 (2d Cir. 1975), while the instruction given to the jury vis a vis "knowledge" was otherwise proper, the court found reversible error in that the charge was not "balanced":

> In the main charge, the District Judge properly charged that "before you find the defendant guilty, you must find beyond a reasonable doubt that she knew the checks were stolen at the time she possessed the checks. If you find that the defendant did not know the checks were stolen, then of course you must acquit the defendant.
>
> The court also charged, after explaining the statutory presumption of recent possession see Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 31 L Ed 380 (1973), as follows:
>
> You might also find that the defendant

> had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen, but with a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the fact which would establish the stolen character of the checks.
>
> This was in no way balanced by an instruction that if the jury nevertheless found that the defendant actually believed that the bills were not stolen they should acquit.

517 F 2d at 587-88 (emphasis added). (Note, however, that in Bright, the jury, after convening, asked for a clarification of the term "reckless disregard". There was a colloquy with defense counsel and the court, wherein counsel asked for an instruction that negligence cannot establish "knowledge". The court refused such an instruction. The reversal was apparently made on the basis of the failure to include the "negligence" instruction.) Accordingly, Bright stands for the proposition that, in the present case, the charge could only be proper if it informed the jury that an actual belief by the defendant that the prescriptions were legitimate would be a bar to conviction. See United States v. Bernstein, 533 F 2d 775, 796

n. 17 (2d Cir. 1976), reaffirming Bright.

In Gallo v. United States, 343 F 2d 361, 1976, the Court reviews a similar claim.

The instruction at page 366 in part reads "as to knowledge that the goods were stolen, this may have been actual, or the facts and circumstances may have been such as would put the defendant on notice that the goods were stolen."

The test is whether the facts and circumstances were such that a reasonably prudent man would be put on notice that the goods were stolen.

An act is done knowingly, done voluntarily and not be mistake or accident or inadvertence."

Gallo objected to this instruction as importing the "reasonable man" test. The Court states at page 66: "There are several federal cases which state that proof of actual knowledge is required." In United States v. Fields, 466 F 2d 119 (2d Cir. 1972), involved a conviction under 18 U.S.C. Section 659, which has a knowledge requirement similar to that of Section 2314. In Fields, the Court held that it was error to instruct the jury that they could find

the defendants "knew" that certain goods were stolen from evidence that "tends to prove such (knowledge) . . ." at page 120. Thereafter, the opinion states that the Government was required to prove that the defendants "actually knew" that the goods were stolen property. d." The Court goes on to state at page 367, "Judge Friendly's fine opinion in United States v. Jacobs, 475 F 2d 270 Cert. 9 414 U.S.C. 21, 94 S. Ct. 131, 38 L Ed 2d 53 (1973), which relates to Section 2314 violation, does state:

> The Jurors in this case were made well aware that they had to find either that defendants actually knew the bills had been stolen or had manifested by their conduct that they were deliberately shutting their eyes to what they had every reason to believe to be the fact.

475 F 2d at 288 (emphasis added). The Court goes on to state at page 367:

> "As we perceive the requirement of the statute as applied in this case, that the accused transported the coins knowing the same to have been stolen . . ., such element is not sufficiently proved by
>
> . . . facts and circumstances such as would or should put the defendant on notice that the goods were stolen . . . such that a reasonably prudent man would be put on notice that the goods were stolen.

It may be true in a given case, such as where the notice was clear and was wilfully ignored, that evidence of such facts may be considered by the jury as part of the proof that an accused possess the requisite knowledge, but it is error to instruct that a guilty verdict can rest solely on facts that would or should put a reasonably prudent man on notice. While there may be factual situations where the notice which the accused received was so strong that knowledge could reasonably be imputed therefrom, there are many other instances where such notice would be insufficient. What the given instruction lacks is the statement that the notice must be such that the jury could conclude therefrom that the accused did know that the goods were stolen. Unless the instruction reaches that point, it fails to satisfy the requirement of the statute.

At page 368:

"The instruction that was given, by permitting a conclusion of knowledge from facts that would put a reasonable man on notice, stopped short of meeting the degree of knowledge that the statute requires and thereby imposes a lesser standard for proving guilt than the act requires. One can conceive of many instances when facts that a reasonable man might notice as conveying knowledge should not be equated with proof of knowledge beyond a reasonable doubt. What is required is that further step that the facts and circumstances of which he is placed on notice, and his actions with respect thereto, are such as to permit a conclusion that he knew the goods were stolen." citing cases.

In United States v. Thompson Hayward Chemical Company, 446 F 2d 583(8th Cir. 1971), the question before the Court was whether or not the defendant "knowingly" failed to do certain acts. The Court held that the instructions given failed to clearly indicate that the Government had the burden of proving beyond a reasonable doubt that the defendants actions were deliberate or the result of wilfull neglect and therefore the instruction was erroneous. The Court stated at page 585:

"This instruction, read as a whole, could easily give the jury the impression that no proof of intent or willfull neglect was necessary and that it was a situation in which the statute imposed strict liability "The Government must prove that the defendant 'deliberately' or wilfully neglected' to do the acts made necessary by the regulation."

There was no proof of an "illegitimate medical purpose" or that the prescription was "not issued in the usual course of professional treatment". There is not sufficient evidence from which the jury could make a factual determination on these variables.

There was no proof of a "studied avoidance

of positive knowledge" hence proof of actual knowledge was also lacking entirely.

The Court's use of "such studied avoidance" clearly implies to the jury that there was in fact "studied avoidance" on the part of the defendant. The entire instruction was highly prejudicial to the defendant as set out in defendant's objection to the Court.

II.

A.

The Court Erred In Admitting Into Evidence Government's Exhibits 1 Through 177 For The Reason That Said Evidence Was Seized Pursuant To A Search Warrant That Was Issued Fixed Upon A Defective Affidavit For The Reason That Said Affidavit Lacked Probable Cause.

B.

The Court Erred In Overruling Defendant's Motion to Quash Said Search Warrant For The Reason That Said Warrant Was Issued Upon An Affidavit That Lacked Probable Cause.

The Affidavit upon which the Magistrate issued its search warrant was made by Detective Ted Zinzelmeyer and states as follows:

"The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as Del Crest Plaza Pharmacy, 8416 Delmar, University City, Missouri, which is a pharmacy located on the ground floor of an office building, east of Highway 725 on the south side of Delmar, the front of the office building facing north, the pharmacy having a glass front with a T-Shirt Shop immediately east of the pharmacy and a lobby immediately west of the pharmacy, in the Eastern District of Missouri there is now being concealed certain property, namely records of purchases and sales of Schedule II narcotic drugs controlled substances, prescription and order forms for Schedule II narcotic drugs, controlled substances and the pharmacy's inventory of all Schedule II controlled substances, which are or have been used as a means of commiting a violation of Title 21, United States Code, Section 841(a)(1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Affiant is a Detective with the St. Louis County Police Department and has been so employed for 8 years. Affiant has been assigned to the Narcotics Section for approximately 6 years.

During the early part of the summer of 1976, the St. Louis County Narcotics Section was advised that large quantities of narcotics and other controlled substances were being sold out of 605 Ellwine, Lemay, Missouri. The St. Louis County Narcotics Section began an investigation which started off with extensive surveillance for approximately a two week period. This investigation revealed large numbers of young individuals going to the 605 Ellwine address, staying a short while, and then leaving.

On July 1, 1976, affiant was introduced to one of the persons staying at the house, a Patricia Lee House, a/k/a Tricia Melton. Affiant met Patricia House at a Velvet Freeze Ice Cream Parlor at 2613 Telegraph Road at which time House

sold affiant 4 yellow tablets for $60.00. The tablets later were analyzed by the St. Louis County Police Department Laboratory and found to be dilaudid. Dilaudid is a Schedule II narcotic drug controlled substance which has a high potential for abuse in that it is a substitute for heroin, and, in fact, is preferred by many heroin addicts in that it gives a quicker rush or high.

Affiant made three more purchases of controlled substances from Patricia Lee House on July 2, 6 and 10. These sales were for 2 dilaudid tablets, 10 preludin tablets and a bottle of liquid dilaudid which was purchased for $200.00. During the negotiation and sale of these three transactions, affiant discussed with House her source for her narcotics and attempted to learn what types of controlled substances House would be able to deliver. House indicated her source was Peggy Linze, who also resided at 605 Elwine. House described Linze as being able to deal in large quantities of liquid dilaudid; that Linze had several

bottles of liquid morphine for sale. The particular bottle of liquid dilaudid purchased on July 10th had a label on it that read: "Dilaudid 20cc Knoll Pharmaceutical". The seal on the top of the bottle was still intact. During the conversation Patricia House explained that Peggy Linze was getting her drugs from a man who was a pharmacist. (our emphasis) House said the only two other persons besides Peggy knew who the fellow was and she was one of them as she was Peggy's number one dealer. Upon further questioning, House stated that the other person was a male, but refused to give out any of the subject's names.

On July 15, 1976, affiant by-passed Patricia House and went directly to Peggy Linze through the use of a confidential informant. Arrangements were made for the purchase of 20 dilaudid tablets. On that date affiant purchased from Peggy Linze and a Ronald Blest 20 dilaudid tablets which were yellow with the imprint K-4 on the tablets.

Affiant has discussed this particular case and the yellow tablets in question with Mr.

Joseph Bono who is a chemist with the St. Louis County Police Department Laboratory, who has advised affiant that this particular type of tablet is a very new type of dilaudid which just came on the market. Affiant continued his investigation of Peggy Linze on July 16, 1976, when affiant purchased 20 dilaudid tablets again at the reduced price of $12.00 a piece. During that transaction and the previous transaction conversations were had concerning purchases of other types of controlled substances. In response to a question as to whether she had any more liquid dilaudid Linze stated she did not, but had liquid morphine for sale for $225.00 per cc bottle. Linze also offered dexamyl pills and amphetamine.

Linze advised that she would not be able to deal until later that day as she was going to meet her man that afternoon. Detective Michael McDonald and Officer Denver Bealmear and Officer Gerald Hawkins conducted surveillance of Linze from her home at 605 Ellwine as she left her home at approximately 3:30 P.M. in a 1974 olive vinyl

over light green Chevrolet Impala. Linze drove to a Venture store located at Kingshighway and Christy and was seen driving around the lot until approximately 4:00 P.M. when she met with a suspect, later identified as Larry Smith, in a black vinyl over silver 1974 Chevrolet Caprice. The black over silver Caprice containing Linze and Smith then drove to the intersection of Inner Belt 725 and Delmar Blvd. where the vehicle stopped in front of a large office building and the subjects exited the vehicle and entered the building. From the surveillance point the officers were unable to note exactly where subjects went. (our emphasis) At approximately 6:10 P.M. Detective McDonald observed the black over silver Caprice return to the Venture store. Linze exited, got into her own vehicle and returned to her home. At 7:15 P.M. Affiant telephoned Linze, who stated she was ready to do the deal and subsequently affiant purchased 20 dilaudid tablets at Dohack's Restaurant in South St. Louis County.

On August 3, 1976, affiant ordered 20 more dilaudid tablets from Linze. Affiant agreed with

Linze to meet with Ronald Blest who had been with Linze on July 15, 1976 to make the purchase from Blest. Affiant met with Blest at the K-Mart Department Store in South County, at which time Blest handed affiant a bag from which affiant removed 20 yellow tablets inscribed "K-4", exactly as the previous tablets had been inscribed. On August 9, 1976, affiant purchased 20 dilaudid tablets from Linze with other discussions concerning marijuana and opium. Further attempted purchases from Linze resulted in affiant being advised that Linze was not home and therefore affiant purchased quantities of dilaudid from Juanita K. Vitale on August 12, 1976 and from Susie Annamay McCallum on August 20, 1976. McCallum also directed affiant to Vitale's new home address where affiant purchased a quantity of heroin.

The St. Louis County Narcotics Section requested aid from the Drug Enforcement Administration in the form of financing and surveillanc manpower for further investigation of Linze to determine her source and her ability to distribute

dilaudid. Such assistance was authorized and on August 24, 1976, affiant contacted Linze by telephone and asked her to meet him. In a subsequent conversation in person affiant advised Linze that he had the financial backing to purchase 200 dilaudid tablets which he wanted the price lowered on due to the large amount. After some negotiation on a $10.00 per tablet price, was agreed upon. Linze stated that she would talk to her man tonight and she would let him know the next day. Linze advised that she was getting 300 tablets per week to deal. After some conversations concerning heroin and cocaine Linze advised affiant to call her the next day before noon.

On August 25, 1976 at approximately 12:00 noon affiant called Linze and advised her he was ready to deal and she stated she would meet her man that night and to be in further contact at a later time. A surveillance team of 8 local and federal officers were prepared. At 7:30 in the evening, affiant called Linze and asked for the 200 tablets and Linze stated that she had

only 100 tablets and could not get the rest until the next day. Surveillance agents then surveilled Linze as she left her home and drove to the Venture store at Kingshighway and Christy where she again met with the previously described white male, Lawrence Alfred Smith, driving a 1974 Chevrolet Caprice. After driving around and meeting with another individual whom Linze the next day stated sold her some cocaine, Linze returned home. On Thursday, August 26, 1976, affiant called Linze at 3:00 p.m.. Linze advised she was getting ready to leave and meet her man. A surveillance team of 8 St. Louis County Police Officers, later joined by officers of the Drug Enforcement Administration, took up surveillance at various places Linze and Smith had been previously seen. This surveillance team included affiant. Linze left her home at approximately 3:30 P.M. and drove to the aforementioned Venture Store parking lot at which time she met with the same individual, now identified as Lawrence Alfred Smith, entered his vehicle and drove to the Del Crest Plaza Shopping Center located at Delmar and Innerbelt 725. Various officers took up

surveillance at stores in the general location and in automobiles. Smith and Linze exited the vehicle and entered the Del Crest Plaza Pharmacy, 8416 Delmar, at approximately 4:05. (our emphasis) Smith was then seen to leave the pharmacy and remove two orange and white boxes and take them into the pharmacy. As his trunk remained open one surveilling officer was able to walk by the trunk and found the boxes were labeled "JIL, Model 852, C.B. Radios." At 4:02 P.M. Smith was seen placing a box in the trunk of his vehicle which was labeled Isomil, a baby formula. Linze had discussed with affiant previously that her daughter had recently had a child.

Due to the size of the Del Crest Plaza Pharmacy being rather small and it being considered too dangerous to surveil from the interior of the pharmacy, various agents from time to time walked into the pharmacy, made a small purchase and left. During one of these incidents, Detective Sturm observed the pharmacist, now identified as Bernard Kershman, hand a brown

paper bag to Smith, who immediately handed it to Linze and stated: "This is hers". (our emphasis) The subjects remained in the pharmacy until approximately 5:20 P.M. During this time they were joined by a white male, approximately aged 60. Detective Michael Adams of the Drug Enforcement Administration, entered the pharmacy to make a purchase and while in the pharmacy was able to overhear a conversation between Smith, the white male, and Linze in the presence of the pharmacist Kershman. (our emphasis) Adams was not able to observe the conversation as his back was to the backs of the individuals but the conversation was in substance as follows: A male voice stated, "If we broke the kegs (a common term used for large quantities of pills) up we could sell more pills. We were too cheap with that last bunch. We could have gotten more money." Linze stated: "We will have to jack the price up next time."

At 5:20 P.M. when Linze and Smith left they surveilled back to the Venture Store where Linze got in her car and drove home and arrived at

approximately 6:15 P.M. Affiant then called Linze who stated that she had met her man and was ready to deal. It should be noted that all the items placed in Smith's trunk, including the boxes of baby formula and the paper bag received from the pharmacist, were observed being placed in Linze's car at the time Smith and Linze returned to the Venture Store. Affiant arranged to meet with Linze at Joe Tangero's Restaurant, 4301 South Broadway, at 8:00 P.M. Surveillance officers at that address observed Larry Smith sitting in his black over silver Caprice on the Kroger's parking lot directly east of Joe Tangero's Restaurant at approximately 7:10 P.M. Surveillance officers advised that Linze arrived at the restaurant at 7:30. After affiant arrived Linze got out of her vehicle and into the affiant's vehicle where she sold to affiant 200 tablets of dilaudid in exchange for $2,000.00, which affiant had been supplied with by the Drug Enforcement Administration. At the same time affiant received a tinfoil package from Linze containing a white powder which she stated was a sample of the cocaine

she had purchased the night before. During the ensuing conversation, Linze stated that she liked dealing in large amounts because with 300 tablets a week it would take the heat off of her house to sell in large quantities rather than in numerous smaller quantities requiring people to come and go from her house all the time.

Affiant has been working closely with Special Agent Terry Sawyer of the Drug Enforcement Administration and other federal officers using computer printouts and other sources of information including the Compliance Section of the Drug Enforcement Administration. Affiant has learned the following: Larry Shipley, Supervisor of the Compliance Section of the Drug Enforcement Administration in St. Louis, advised that their records, <u>although incomplete</u>, (our emphasis) show that Del Crest Plaza Pharmacy has ordered and received 1400 4 mg. tablets of dilaudid from Meyer Brothers Pharmaceutical Company from February 1976 through May 25, 1976. Shipley also advised that the Drug Enforcement Adminis-

tration gets a copy of orders to various pharmaceutical companies and these copies indicate the following: Del Crest Plaza Pharmacy ordered and received 500 dilaudid #4 mg. tablets and 500 preludin on June 17, 1976 from the AMFAC Pharmaceutical Company; on June 28, 1976 500 preludin from AMFAC; on July 6, 1976, 600 preludin tablets and 600 dilaudid tablets; on July 13, 1976 500 preludin tablets and 500 dilaudid tablets.

Shipley advised affiant that these particular records are not complete in that the accuracy of such information depends solely on whether or not the pharmaceutical companies properly supply the Drug Enforcement Administration with their copy of all orders and deliveries and further depends on how up-to-date these copies are when furnished. From affiant's own knowledge and with further consultation with Mr. Shipley, affiant knows that dilaudid is a very rarely prescribed drug which is used almost exclusively for terminal cancer patients who are in extreme pain. In most instances with such patients if dilaudid is used doctors prefer the injectible

form of dilaudid rather than the tablet form. Shipley advised that those 1600 tablets demonstrate to have gone to Del Crest Plaza Pharmacy during less than a month period from June 17th through July 13th is considered to be a greatly excessive amount. Likewise, the large amount of preludin. Shipley advised affiant that a random sample was taken of various pharmacies to see how much dilaudid they were purchasing and in the same period these six stores including one right across the street from Del Crest Plaza Pharmacy, which is a much larger store than the Del Crest Pharmacy, ordered a total of 300 dilaudid.

WHEREFORE, affiant asks that a search warrant be issued for the Del Crest Pharmacy to seize the inventory of all Schedule II drugs with the supporting records of purchases and sales in that affiant's investigation has revealed the following:

(1) Early in the investigation information was received from Patricia House that Peggy Linze was getting her drugs from a pharmacist;

(2) Through discussions and purchases from Linze it has been learned that she has the ability to deal in large quantities of dilaudid, claiming to deal 300 tablets a week;

(3) On two separate occasions when Linze announced she was going to meet her man to make a pickup she and Larry Smith were followed to the Del Crest Plaza Pharmacy where at least on one occasion she received a brown paper bag and immediately after returning home was for the first time that day able to deal dilaudid.

(4) That based on the compliance investigation done by Mr. Shipley and his staff, it is learned that this particular pharmacy is receiving and distributing highly excessive amounts of both dilaudid and preludin considering the store size and nature of the drugs in question."

There was not a single affirmative statement in the Affidavit that states that the drugs that the affiant had purchased had come from defendant, Bernard Kershman. There is a hearsay statement that "Peggy Linze was getting her drugs from a man who was a pharmacist." The hearsay statement of Detective Sturm states that he saw Bernard Kershman "hand a brown paper bag to Smith, who immediately handed it to Linze and stated: 'This is hers'". There is nothing even in the hearsay statement that even suggests that there were dilaudid and/or preludin or any other drugs in the brown paper bag. There isn't even anything in the hearsay statement that indicates that the subject Smith handed a prescription to defendant Kershman or even asked defendant Kershman for any drugs. The hearsay statement of Detective Michael Adams states that he overheard a conversation of the individuals and heard an unidentified male voice state: "If we broke the kegs (a common term used for a large quantity of pills) up we could sell more pills". There is nothing in the hearsay allegation that defendant Kershman was a party to said conversation, acknowledged said conversation, and in view of the affidavit that the pharmacy was small and "being rather small" it was not unusual that the statement may have been made in the presence of defendant Kershman. There is nothing in the statement to even indicate

that defendant Kershman was within hearing range of said statement.

The hearsay statement of Larry Shipley acknowledges that the records of the Drug Enforcement Administration are "although incomplete". There is nothing in the hearsay statement of Larry Shipley that the dilaudid that was purchased by affiant was in fact the same manufacturer that the manufacturer's shipped to defendant Kershman. There is nothing in the affidavit that even claims that defendant Kershman was in fact even selling the dilaudid to Peggy Linze or Larry Smith.

The Affiant was acting as an undercover agent and was purchasing controlled substances from Patricia Lee House. House explained that she was getting her drugs from Peggy Linze and that Peggy Linze was getting her drugs from a man who was a pharmacist. The affidavit then recites an independent investigation which attempts to corroborate the information that the affiant received from Patricia House. In Aguilar v. Texas, 378 U.S. 108, 12 L. Ed 2d 84 Sup. Ct. 1509 (1964) a search warrant was issued upon an affidavit

of police officers who swore that they had received reliable information from a credible person and as a result believed that narcotics were being illegally stored on defendant's premises. The affidavit in the case at bar, is in the nature of information that the affiant undercover police officer gathered begging the confidence of Patricia House. The affiant in the case at bar did not attempt to claim in his affidavit that the information he received from Patricia House was in fact "credible" or "reliable". In Aguilar, the Court held the application for the search warrant failed to set forth any of the "underlying circumstances necessary to enable the Magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were." There is nothing in the affiant's affidavit in the case at bar that would enable the Magistrate independently to determine that records of purchases and sales of Schedule II narcotic drugs prescription and order forms for

Schedule II narcotic drugs were in fact located where affiant stated they were located.

The affidavit fails to set forth any underlying circumstances to enable the Magistrate to independently judge the validity of Patricia House's statement.

The statement of Patricia House is in the nature of an informer's tip.

Spinelli v. U.S.A., 393 U.S. 410, 21 L. Ed. 637, 89 S. Ct. 584, the Court reviews an affidavit for the issuance of a search warrant and the Court observes at page 643:

> "The informer's report must first be measured against Aguilar's standards so that its probative value can be assessed. If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration? Aguilar is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determin by a "neutral and detached magistrate", and not by "the officer engaged in the often

competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 92 L Ed 436, 440, 68 S. Ct. 367 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which - even when partially corroborated - is not as reliable as one which passes Aguilar's requirements when standing alone.

Applying these principles to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that Aguilar's other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information - it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. CF. Jaben v. United States, 381 U.S. 214, 14 L Ed 2d 345, 85 S. Ct. 1365 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

There is nothing in the affidavit in the case at bar that even accuses the defendant of any criminal activity much less sufficient detail that is required by Spinelli.

The Court goes on to state:

> "When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves and they are not endowed with an aura of suspicion by virtue of the informer's tip. Nor do we find that the FBI's reports take on a sinister color when read in light of common knowledge that bookmaking is often carried on over the telephone and from premises ostensibly used by others for perfectly normal purposes. Such an argument would carry weight in a situation in which the premises contain an unusual number of telephones or abnormal activity is observed, CF. McCray v. Illinois, 386 U.S. 300, 302, 18 L Ed 2d 62, 65, 87 S. Ct. 1056 (1967) but it does not fit this case where neither of these factors is present. All that remains to be considered is the flat statement that Spinelli was "known" to the FBI and others as a gambler. But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give (393 US 419) additional weight to allegations that would otherwise be insufficient.

The affidavit falls short of the standards set forth in Aguilar, Draper, and our other decisions that give content to the notion of probable cause. In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89, 96 13 L Ed 2d 142, 147, 85 S. Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311, 18 L Ed 2d 62, 70, 87 S. Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108, 13 L Ed 2d 684, 688, 85 S. Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271, 4 L Ed 2d 697, 707, 708, 80 S. Ct. 725, 78 ALR 2d 233 (1960). But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

There is nothing in the affidavit in the case at bar that defendant Kershman was committing any crimes. There isn't even a showing of a probability of criminal activity by the defendant.

The affidavit falls short by any test, even less rigorous standards, to satisfy the requirements

set forth in Aguilar and Spinelli.

III.

The Court Erred In Allowing Witness, Detective Becker, To Testify To An Out Of Court Declaration Made By Co-Defendant Smith For The Reason That Said Statement Was Made After The Conspiracy Had Come To An End And Not Made In Furtherance Of Said Conspiracy.

The Honorable John K. Regan issued an order to compel the defendant Smith to give handwriting samples. There is no question that the object and purpose of the conspiracy had come to an end. The United States Attorney introduced Smith's hearsay statements to tend to prove that the prescriptions were false but that the Government could not prove it because of what Smith said and did. The United States Attorney asked the following questions:

Q. Did you give Mr. Smith any instructions on when those particular handwriting samples were taken?

A. Yes, sir. I requested that Mr. Smith

first off write his name; things like that; to write down different addresses; different names that I had in my possession that I wanted him to write.

Q. What particular names did you ask him to write?

A. MR. SCHWARTZ: If your Honor please, may we approach the bench?

THE COURT: Yes.

(Whereupon the following proceedings were had at the bench, in the presence but out of the hearing of the Jury.)

MR. SCHWARTZ: This is obviously after any conspiracy came to an end. This is pursuant to an order issued by you.

THE COURT: I issued the order, there's no question about it.

MR. SCHWARTZ: And I don't see any relevancy as to - -

THE COURT: It is relevant to the prescriptions for one thing.

MR. COUGHLIN: Very.

MR. SCHWARTZ: What he is going to get in to next, Judge, is that Mr. Smith attempted

to feign his signature and write in such a manner that nobody could tell what it was. Now, that's not relevant.

MR. COUGHLIN: It's as relevant as it possibly can be. The prescriptions are phony and I'm going to prove it.

MR. SCHWARTZ: But that has nothing to do with defendant Kershman.

MR. COUGHLIN: Yes, it does.

THE COURT: I think it is all part of the conspiracy.

MR. SCHWARTZ: Judge, it had come to an end.

THE COURT: No. This merely goes back to show that the prescriptions are phony. No, he can show it.

(Whereupon, the following proceedings were had in the presence and in the hearing of the Jury.)

Q. (Mr. Coughlin) Did you give Mr. Smith any instructions when he was making those handwriting exemplars?

A. Yes, I explained to him what I wanted

him to write.

Q. And where did you get the names that you asked him to write on there?

A. They came from scripts that apparently had been forged.

Q. And how long did that handwriting exemplars take place?

A. The period of time they covered?

Q. Yes.

A. Approximately a little over an hour.

Q. And did you give Mr. Smith any further instructions after viewing his handwriting exemplars?

A. After the first page, why, I had him write his name 10 times and print his name 10 times, two different pages, I noticed that Mr. Smith was writing rather large and also bearing down extremely heavy. I would have to - - after the first page was written I would have to tear down into the pad, say tear off about five sheets because he was writing that hard. He was making indentations further down. And I requested that Mr. Smith not bear down so hard and I also

requested if he could write smaller and he stated to me that he couldn't.

MR. SCHWARTZ: If Your Honor please, I'm going to object to what Mr. Smith said. That is obviously hearsay.

MR. COUGHLIN: Your Honor, I submit it is not hearsay. It's not to the truth of the matter - -

THE COURT: It will be overruled. (TR. 87-90).

There is no question that the prejudicial hearsay statement of co-defendant Smith (who was not tried with defendant Kershman) was made after the object and purpose of the conspiracy had come to an end.

This Court has held that extrajudicial statements of a co-conspirator made after the conspiracy had come to an end, or not in furtherance of the conspiracy are inadmissible. Lutwak v. United States, 344 U.S. 604, 97 L Ed 593, 73 S. Ct. 481 and Krulewitch v. United States, 336 U.S. 440 93 L Ed 790, 69 S. Ct. 716.

IV.

The Court Erred In Overruling Defendant's Motion For Mistrial After Rebuttal Witness Candice Wilson Testified That "She Didn't Want To Get Involved In Something Like This" and That She Did Not Like The Way He (Defendant) Was Conducting His Pharmacy For The Reason That Said Statements Were Highly Prejudicial And Inferred That Defendant Was Committing Other Illegal Acts And Said Statement Constituted Improper Rebuttal Testimony.

The United States called Candice Wilson, a former employee of defendant Bernard Kershman. She had worked for the defendant for approximately four days. (TR. 804).

The United States called Ms. Wilson as a rebuttal Witness. The United States attorney asked Miss Wilson the following: (TR. 804, line 15)

Q. And why did you - - what caused you to leave there?

A. I had just taken - - was going to be taking my boards and I didn't want to become involved in anything. I didn't care about the

way he was doing his practice.

MR. SCHWARTZ: Judge, may we approach the bench, please?

THE COURT: You may.

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the Jury.)

MR. SCHWARTZ: Judge, that's not only improper rebuttal, it's highly prejudicial. I ask the Jury be discharged and a mistrial be declared.

MR. COUGHLIN: It is direct, it couldn't be more on point as to what the defense was in this particular case. Mr. Schwartz has painted Mr. Kershman as the greatest pharmacist in the history of the western world and the facts of the matter are it isn't the truth. He has stated that he has informed students to call doctors to properly update things.

THE COURT: Of course, the point is that she said she doesn't want to get involved in anything.

MR. COUGHLIN: It's not that bad of a

statement, Your Honor.

THE COURT: Well, let's straighten it out. It will be overruled at this time.

(Whereupon the following proceedings were had in the presence and in the hearing of the Jury.)

Q. (Mr. Coughlin) Were you present on the day when two individuals were arrested outside the pharmacy?

A. Yes, I was.

Q. And did you fill any prescriptions for those individuals to your knowledge?

A. I didn't know it until afterwards that - -

Q. What names were they?

A. I believe it was two first initials, the last name was Pruitt, and it was like J. Pruitt and L. Pruitt I believe.

Counsel objected on the grounds that the statement of the witness constituted improper rebuttal. The prejudicial nature of the statement inferred that the defendant was committing other illegal acts or crimes. The witness had only worked for defendant for a period of four days.

In view of all of the other testimony that the jury heard concerning the filling of prescriptions set out in exhibits 1 through 177, the jury could have well inferred that the witness was referring to other crimes not the subject of the matter for which defendant was on trial.

There are many cases holding that rebuttal testimony must specifically relate to certain evidence offered by the defendant. Whether or not the statement is prejudicial or proper rebuttal testimony will turn upon the peculiar facts of the instant case. In an attempt to comply with the spirit of expeditious handling of criminal appeals, counsel feels review of those cases holding comments to be improper or testimony to be improper rebuttal will serve no useful purpose and only lengthen the brief.

CONCLUSION

It is counsel's opinion that the conduct of appellant was nothing more than that which a pharmacist is authorized and required to do and that the evidence presented failed to prove

that he criminally participated in any of the acts alleged. The particular instruction that appellant complains of was patently weighted in favor of the Government. All of the other claims of error in addition to the aforesaid requires that the Court grant Certiorari to review said claims.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 76-2075

UNITED STATES OF AMERICA, Appellee, v BERNARD KERSHMAN, Appellant.	* * * * * *	Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: April 11, 1977
Filed: May 18, 1977

Before HEANEY, ROSS and STEPHENSON, Circuit Judges

STEPHENSON, Circuit Judge

This direct criminal appeal is taken from a jury's verdict of guilty on three counts of a 19-count indictment.[1] The three counts charged appellant Kershman with the knowing and intentional distribution of dilaudid (a Schedule II narcotic drug controlled substance), in violation of 21 U.S.C. §841(a)(1) (two counts), and

conspiracy, in violation of 21 U.S.C. §846. The district court[2] imposed sentence pursuant to 18 U.S.C. §4205(c). Appellant alleges that errors in the instructions to the jury, in the admission of certain government exhibits, in the refusal to grant defendant's motion for mistrial, and in the refusal to voir dire the jury panel on certain questions proposed by the defendant, compel reversal of this conviction. In addition, appellant Kershman contends that the evidence was insufficient to sustain the verdict. We affirm.

Appellant Kershman has been a pharmacist for 39 years and has owned the Del Crest Plaza Pharmacy for the last 10 years. He came under suspicion as a result of an investigation by the St. Louis County Police Department of co-defendants Peggy Linze, Lawrence Alfred Smith and Patricia House.

[1]The indictment was filed against appellant and three other persons, Peggy Linze, Lawrence Alfred Smith and Patricia House. Appellant was granted a severance.

[2]The Honorable John K. REgan, United States District Judge for the Eastern District of Missouri.

The government's evidence showed that in May of 1976, the St. Louis County Police Department started surveilling the residence of Peggy Linze. In July officer Ted Zinselmeier arranged a purchase of dilaudid from Patricia House. After gaining House's confidence, he asked her about her supplier. House replied she was getting the dilaudid from Peggy Linze. When asked by Zinselmeier as to Linze's supplier, House replied that Linze had a connection who was a pharmacist. After several purchases from House, Officer Zinselmeier began purchasing dilaudid from Peggy Linze.

Prior to a purchase of dilaudid on July 26, 1976, Linze advised Zinselmeier that she was out of dilaudid and was leaving to meet her "man". She was followed to a location where she met Lawrence Alfred Smith and from there the two proceeded to an office building where Kershman's pharmacy was located. Upon Linze's return from the office building, she was able to complete the sale of dilaudid to Zinselmeier. Another similar transaction took place during August of 1976.

On September 8, 1976, Zinselmeier arranged for a purchase of 425 tablets of dilaudid for $4,000 from Linze. Linze stated she would have to meet her "man" the next day to acquire a sufficient supply of dilaudid to complete the deal. Linze was followed, along with Lawrence Alfred Smith, to Kershman's pharmacy on September 9, 1976. Linze and Smith were arrested as they left the Del Crest Plaza Pharmacy with three bottles of dilaudid in their possession. Appellant Kershman was immediately approached by the police at which time he produced three prescriptions for the dilaudid he had just dispensed. A search warrant was then served and numerous order forms and prescriptions were seized from Kershman's pharmacy.

The first issue we address on this appeal is the appellant's contention of error in the instructions to the jury. More specifically, appellant Kershman contends that the following instructions assumed facts not in evidence and changed the reasonable doubt standard to a reasonably prudent man standard:

In this connection, you are further instructed that if you find that the prescriptions for Dilaudid which defendant filled and which are involved in Counts 12 and 16 were not issued for a legitimate medical purpose by a physician during the usual course of his professional practice and that under the facts and circumstances known to him defendant had every reason to believe that such purported prescriptions had not been issued for a legitimate medical purpose, and that defendant deliberately and consciously closed his eyes to what he had every reason to believe was the fact, such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in this case, that defendant knew that such purported prescriptions had not been issued for a legitimate medical purpose, and hence were knowingly filled by him.

Several circuits have approved the use of an instruction wherein the jury is instructed that the element of knowledge may be shown by deliberate ignorance. United States v. Jewell, 532 F 2d 697 (9th Cir.), cert. denied, 96 S. Ct. 3173 (1976); United States v. Dozier, 522 F 2d 244, 225-27 (2d Cir.), cert. denied, 423 U.S. 1021 (1975); United States v. Thomas, 484 F. 2d 909, 912-14 (6th Cir.), cert. denied, 414 U.S. 912 (1973); United States v. Grizaffi, 471 F. 2d 69, 75 (7th Cir. 1972), cert. denied, 411 U.S. 964 (1973). The appellant does not take exception to this

line of authority. He argues, however, that the above instructions implied to the jury that there was in fact "studied avoidance" on the part of the defendant. We note that the instruction specifically states "if you find that" and later refers to those findings as "such studied avoidance of positive knowledge." Therefore, we reject appellant's argument that the instructions assumed facts not in evidence.

Similarly, we reject appellant's argument that the instruction changed the standard of guilt from reasonable doubt to a reasonably prudent man standard. In essence, the appellant contends that the instructions failed to emphasize that subjective belief is the determinative factor. Therefore, the jury was allowed to convict on an objective theory of knowledge - - that a reasonable man would have believed that the prescriptions had not been issued for a legitimate medical purpose.

It is axiomatic that the jury instructions should be construed as a whole. See United States v. Thompson-Hayward Chemical Co., 446 F.

2d 583, 585 (8th Cir. 1971). The challenged instructions given here by the district court required the jury to find that the defendant deliberately and consciously closed his eyes. Moreover, the jury was instructed that if the pharmacist believed in good faith that a prescription was issued and prescribed for a legitimate medical purpose by a physician acting in the usual accord of his profession, then the pharmacist is excepted from criminal responsibility.

In addition the court generally instructed as follows:

> The matter of intent is, of course, an essential element which must exist in order for an accused to be criminally liable. Therefore, in order to find the defendant guilty, you must not only believe that he did the acts complained of, and of which he here stands charged, but you must also believe that the acts were intentionally, willfully and knowingly done by the defendant.
>
> An act is done "willfully" if done voluntarily and intentionally, and with specific intent to do something the law forbids.
>
> The term "knowingly" as used in these instructions means that the act was done voluntarily and purposely and not because of a mistake or accident or some other innocent reason. Knowledge may be proved by the defendant's conduct and by all the acts and circumstances surrounding the case.

In light of all these instructions, we conclude that the jury was not permitted to convict on an "objective" rather than "subjective" theory of the knowledge requirement as urged by appellant. Accordingly, the trial court did not err in its instructions to the jury.

Appellant next contends that the district court erred in admitting into evidence prescriptions which were seized from the Del Crest Plaza Pharmacy pursuant to a search warrant. More particularly appellant argues that the affidavit for the search warrant lacked probable cause. We disagree.

This court has stated on several occasions that "The affidavit need only establish the probability of criminal activity and secreting of evidence on specific premises, not proof beyond a reasonable doubt." United States v. Jones, 545 F. 2d 1112, 1114 (8th Cir. 1976), quoting from United States v. Smith, 462 F. 2d 456, 460 (8th Cir. 1972).

Turning to the record before us, the affidavit set forth the undercover investigation

of Peggy Linze and her associates concerning the dilaudid sale. One associate had stated that Linze's supplier was a pharmacist. On at least one occasion Linze and Lawrence Alfred Smith had been followed by a surveillance team to Kershman's pharmacy. After the visit to the pharmacy, Linze was able to sell a large quantity of dilaudid. The affidavit recites that during one of these pharmacy visits Detective Stern, who was inside the pharmacy, observed appellant Kershman hand a brown paper bag to Smith who immediately handed it to Linze and stated: "This is hers." The affidavit further stated that the Del Crest Plaza Pharmacy had received a large amount (1600 tablets) of dilaudid from June 17 to July 13, 1976. Dilaudi is a very rarely prescribed drug used almost exclusively for terminal cancer patients. Our review of the lengthy affidavit convinces us that it set forth sufficient reliable underlying facts for the issuing court to find that there was probable cause to believe that records of purchases and sales of Schedule II narcotic drug prescription were present at the Del Crest Plaza Pharmacy which

should be seized.[3]

Appellant's next contention is that the district court erred in refusing to grant appellant's motion for mistrial. The government called Candice Wilson as a rebuttal witness. Ms. Wilson had worked for Kershman for four days. When asked by the government her reason for leaving her position at Kershman's pharmacy, she replied in part that she "didn't want to become involved in anything." The defense immediately asked for a mistrial on the grounds that her answer was prejudicial and improper rebuttal. The district court directed the government to clarify the matter and overruled the defendant's motion. Thereafter the government asked the witness if she was present on the day that the two individuals were arrested outside the pharmacy, to which she responded in the affirmative. In light of this explanation, we are satisfied that appellant has failed to show an abuse of the trial court's discretion in failing to grant a mistrial. See United States v. Vitale, 549 F. 2d 71, 72-73 (8th Cir. 1977).

The appellant next contends that the district court erred in refusing to voir dire the jury panel on the questions proposed by appellant. As this court has previously stated:

> We are required to recognize that the form and scope of a voir dire examination are matters that are left largely to the discretion of the trial judge and that it is only rarely that a supposed deficiency in a voir dire examination will call for correction by an appellate court.

United States v. Cosby, 529 F. 2d 143, 147-48 (8th Cir. 1976). Here appellant's proposed questions dealt with specific areas of the law of conspiracy. The district court commented to counsel that it was not going to ask these questions since it would be later instructing the jury on that area of the law. The defense did not object. Our review of the district court's careful voir dire interrogation of the jurors convinces us that the procedural rights of the appellant were adequately protected.

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[3]The government argues alternatively that the officers involved in the seizure had a right pursuant to 21 U.S.C. §827 to examine the records which were seized. If the officers have a right to examine the records, the government argues they likewise have a right to seize them as evidence of the crime. Although we need not decide this issue in light of the fact that the affidavit was sufficient, we note that in a similar situation the First Circuit has upheld such a seizure. United States v. Wilbur, 545 F. 2d 764 (1st Cir. 1976). See United States v. Rabicoff, 55 F. Supp. 88 (W.D. Mo. 1944).

Accordingly, we find that appellant's contention that the voir dire examination was deficient is without merit.

The appellant finally contends that the evidence was insufficient to sustain the verdict.[4] We have carefully and thoroughly reviewed the record and an exhaustive recitation of it would not be helpful. Taking the substantial evidence we find in the record in the view most favorable to the government and accepting as established all reasonable inferences from the evidence that tend to support the action of the jury, United States v. Frazier, 545 F. 2d 71, 74 (8th Cir. 1976), we conclude that there was sufficient evidence to sustain the verdicts.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[4] Although appellant argues that the district court erred in allowing Officer Becker to testify to an out-of-court declaration made by co-defendant Smith it is clear from the record that Smith's statement that he could not write smaller (made during the time he was giving a handwriting sample) was not offered to prove the truth of the matter asserted. Therefore, we find appellant's argument without merit.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-2075 (76-CR-14(1,12)) September Term, 1976

United States of America,

Appellee,

vs.

Bernard Kershman,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

May 18, 1977

A true copy.

Attest:

Clerk, U. S. Court of Appeals, 8th Circuit.
June 27, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-2075 September Term, 1976

United States of America, Appellee, vs. Bernard Kershman, Appellant.) Appeal from the United States District Court for the Eastern District of Missouri.

On consideration of Appellant's motion for stay of issuance of mandate in this cause, it is now here ordered by this Court that Appellant's motion for stay of issuance of mandate be and is hereby denied.

June 27, 1977

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

76-2075 September Term, 1976

United States of America, Appellee, vs. Bernard Kershman, Appellant.) Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 10, 1977

Supreme Court of the United States

No. A-44

BERNARD KERSHMAN,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9, 19 77

/s/ Lewis F. Powell

Associate Justice of the Supreme Court of the United States

Dated this 15th day of July, 19 77